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No. 02-1680

IN THE

Supreme Court of the United States

CIGNA CORPORATION, *et al.*,
Petitioners,

v.

PAUL LEODORI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of the Petitioners in this case. The written consent of Petitioners Cigna Corp., *et al.* has been filed with the Clerk of the Court. Respondent Paul Leodori *pro se* has refused consent.

In support of its motion, EEAC by the following shows that this brief brings relevant matters to the attention of the Court that have not already been brought to its attention by the parties:

1. The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in

1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 340 of the nation's largest private sector corporations.

2. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

3. All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 Act (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621 *et seq.*, Titles I and V of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, as well as other equal employment statutes and regulations.

4. Many of EEAC's members have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts include agreements to arbitrate disputes arising out of the employment relationship.

5. As employers, and as potential respondents to employment discrimination claims, EEAC's members have a strong interest in the issue presented for the Court's consideration regarding whether, as the court below ruled, a state court may adopt a rule requiring an employee's "unmistakable" assent to an arbitration agreement before the agreement will be enforced, when

no such requirement is generally applicable to the enforceability of other contracts under state law, or whether such requirement is preempted by the Federal Arbitration Act.

6. EEAC's members, the vast majority of which conduct business in multiple states, have an ongoing interest in preserving the uniform enforceability of agreements calling for arbitration of employment-related disputes. Arbitration is a flexible, efficient, and effective alternative means of resolving discrimination claims and other employment-related issues. Agreements to arbitrate, like other privately negotiated contracts, afford parties to a dispute the right to establish clear standards and criteria against which their future conduct will be judged. It follows, then, that such agreements must be strictly enforced in the same manner and to the same extent as any other valid contract.

7. The issues presented in this appeal are extremely important to the nationwide constituency that EEAC represents. Contrary to the guiding principles established by this Court, the court below improperly failed to enforce an agreement to arbitrate employment disputes in the same manner as it would any other contract. In so doing, it deepened the conflict among the courts regarding the right of individual states to craft laws and rules applicable only to agreements to arbitrate, which ultimately work to undermine the federal public policy favoring private arbitration of disputes.

8. Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Because of its significant experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests that the Court grant it leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* contingent upon the granting of the accompanying motion for leave. The brief supports the petition for a writ of *certiorari*.[1]

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 340 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621 *et seq.*, Titles I and V of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, and other employment-related statutes and regulations. Many of EEAC's members have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts include agreements to arbitrate disputes arising out of the employment relationship.

EEAC's members, the vast majority of which conduct business in multiple states, have an ongoing interest in preserving the uniform enforceability of agreements calling for arbitration of employment-related disputes. Arbitration is a flexible, efficient, and effective alternative means of resolving discrimination claims and other employment-related issues. Agreements to arbitrate, like other privately negotiated contracts, afford parties to a dispute the right to establish clear standards and criteria against which their

future conduct will be judged. It follows, then, that such agreements must be strictly enforced in the same manner and to the same extent as any other valid contract.

Thus, the issues presented in this appeal are extremely important to the nationwide constituency that EEAC represents. Contrary to the guiding principles established by this Court, the court below improperly failed to enforce an agreement to arbitrate employment disputes in the same manner as it would any other contract. In so doing, it deepened the conflict among the courts regarding the right of individual states to craft laws and rules applicable only to agreements to arbitrate, which ultimately work to undermine the federal public policy favoring private arbitration of disputes.

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs in numerous cases before this Court and others supporting the enforceability of private agreements to arbitrate.[2] EEAC thus is familiar with the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

This case involves the New Jersey Supreme Court's refusal to enforce a valid agreement to arbitrate to which an employee and his employer agreed to be bound for the resolution of all employment-related disputes. Respondent Paul Leodori was hired by Insurance Company of North

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[2] E.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Green Tree Fin Corp. v. Randolph*, 531 U.S. 79 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *EEOC v. Waffle House*, 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Bazzle, cert. granted*, 123 S. Ct. 817 (2003).

America (INA), a company related to Petitioner Cigna Corporation, in June 1995. Pet. App. 3a. He was employed as an attorney within INA's Division of Legal & Public Affairs (L&PA). *Id.*

Nearly a year before Respondent was hired, L&PA implemented a mandatory arbitration policy requiring the use of arbitration to resolve all employment-related disputes. *Id.* In August 1996, INA sent a revised mandatory arbitration policy to all L&PA employees, including Respondent. *Id.* Thereafter, in June 1998, the company distributed an L&PA employee handbook, which included a provision requiring arbitration as a term and condition of continued employment. Pet. App. 4a. The handbook was accompanied by an acknowledgement form, which was signed by Respondent in June 1998. Pet. App. 5a.

The following month, the company distributed another handbook, which also contained a mandatory arbitration provision. *Id.* Upon receipt of the handbook, employees were required to sign an acknowledgement form, as well as an "Employee Handbook Receipt and Agreement," which "described the arbitration agreement as a term of employment." Pet. App. 6a. Respondent did not sign the latter form. Pet. App. 7a.

Respondent's employment was terminated in May 1999, and in February 2000, he filed an action in New Jersey state court challenging his discharge. Pet. App. 9a. The trial court dismissed the action, "finding that the parties had entered into a binding agreement to arbitrate their dispute." *Id.* Respondent appealed, and the New Jersey Appellate Division reversed. Pet. App. 9a-10a. The New Jersey Supreme Court granted Petitioner's petition for certification. Pet. App. 10a.

In affirming the Appellate Division's ruling, the New Jersey Supreme Court determined that the arbitration agreement contained in the employee handbook could not be

enforced against Respondent because he failed to sign the "Employee Handbook Receipt and Agreement" form indicating his intent to be bound by the arbitration provision. Pet. App. 16a. Petitioners now have petitioned this Court for a writ of *certiorari*.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to resolve a growing conflict in the courts regarding whether a state may hold private agreements to arbitrate to a higher standard of enforceability than is generally applicable to other private contracts without running afoul of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.* The answer, pursuant to this Court's pronouncements in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), simply is no. A state law, whether statutorily or judicially created, that imposes greater burdens on the enforceability of mandatory agreements to arbitrate than apply to other types of contracts is incompatible with, and therefore is preempted by, the FAA.

Despite the fact that implied contracts—which are unsigned—generally are enforceable under New Jersey state law, the court below refused to enforce an arbitration agreement contained in an employee handbook because it lacked the employee's actual signature indicating his "unmistakable" intent to be bound. While tacitly acknowledging the FAA's aim "to place arbitration agreements upon the same footing as other contracts," Pet. App. 12a, the court below nonetheless concluded, "In our view, a valid waiver results only from an explicit, affirmative agreement that unmistakably reflects the employee's assent." Pet. App. 14a. In a vain attempt to justify its ruling, the court remarked, "We do no more than conclude that an arbitration provision cannot be enforced against an employee who does not sign or other-

wise explicitly indicate his or her agreement to it. Consistent with basic contract law, that unremarkable conclusion in no way offends the FAA." Pet. App. 17a.

The court below misconstrued the actual nature of its ruling. The rule it adopted is not one of general applicability, but is directed specifically at agreements to arbitrate that require employees to waive their right to pursue claims in a judicial forum. Thus, it is quite remarkable and stands in direct conflict with this Court's declaration time and again that agreements to arbitrate are to be enforced to the same extent and degree as are other valid contracts. In holding the arbitration agreement to a higher standard than applies to other types of contracts, the court below joins several others that continue to disregard the clear limitations this Court has placed on the ability of state courts to regulate private agreements to arbitrate.

The lack of consistency in the courts regarding whether, and under what circumstances, private arbitration agreements may be held to higher enforceability standards than those applied to other private contracts creates substantial uncertainty in an area of law that is of great importance to the business community. As a direct consequence of the circuit court divide on this issue, many employers are constrained in their ability to enforce agreements to arbitrate in a uniform and consistent manner.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S RULINGS IN *SOUTHLAND* AND *DOCTOR'S ASSOCIATES* ON AN ISSUE OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYMENT COMMUNITY

In refusing to enforce an agreement to arbitrate contained in an employee handbook, the court below applied a different, more stringent rule than is "generally applicable" to other

contracts under New Jersey state law. Its decision thus impermissibly conflicts with this Court's seminal decisions in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) and should be reversed.

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court ruled that a state law requiring resolution by judicial forum of all applicable claims—and thus precluding the enforcement of valid mandatory arbitration agreements—impermissibly conflicts with, and is preempted by, the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. In so doing, the Court relied on the plain language of Section 2 of the FAA, which provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. It observed:

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be a part of a written . . . contract "evidencing a transaction involving commerce" and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract."

465 U.S. at 10-11 (footnote omitted). The Court thus concluded, "In enacting [Section] 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id*. at 10.

The Court reiterated this principle in *Perry v. Thomas,* 482 U.S. 483, 492 n. 9 (1987)(citations omitted):

> [S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at

> issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.

In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), this Court ruled that only "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." 517 U.S. at 687. There, the Court considered the validity of a Montana state law that imposed a special notice requirement for all contracts subject to arbitration. Because this special notice requirement applied only to agreements to arbitrate, and not "'any contract,'" the Court concluded that the requirement "is thus inconsonant with, and is therefore preempted by, the federal law." *Id.* at 688.

In complete disregard of this Court's prior rulings [3], the court below refused to enforce an agreement to arbitrate contained in an employee handbook, holding that such an agreement "results only from an explicit, affirmative agreement that unmistakably reflects the employee's assent." Pet. App. 14a. While paying lip service to the "settled law that parties to an agreement may waive statutory remedies in favor of arbitration," Pet. App. 10a, the court below determined nonetheless, "[t]o enforce a waiver-of-rights provision *in this setting*, the Court requires some concrete manifestation of the employee's intent as reflected in the text of the agreement itself." *Id.* (emphasis added) (internal quotations and citation omitted).

Acknowledging that a party's signature is not "strictly required" in order to enforce other types of agreements under

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[3] Indeed, the decision below does not make a single reference to the Court's prior rulings on this issue.

New Jersey's implied contract doctrine, Pet. App. 18a, the court below determined that the doctrine "does not extend to a waiver-of-rights agreement." *Id.* It thus concluded that the arbitration agreement in this case—which requires employees to forgo a judicial forum in favor of an arbitral forum—"cannot be enforced against an employee who does not sign or otherwise explicitly indicate his or her agreement to it." Pet. App. 17a.

In holding the arbitration agreement in the instant case to a higher standard than applies to other types of contracts, the court below blatantly disregarded this Court's prior rulings prohibiting states from regulating such agreements beyond the bounds of the FAA. Accordingly, the petition for a writ of *certiorari* should be granted in this case.

II. THERE IS CONSIDERABLE DISAGREEMENT IN THE COURTS AS TO THE EFFECT OF A STATE RULE THAT LIMITS ENFORCEABILITY OF AN AGREEMENT TO ARBITRATE IN A MANNER THAT IS NOT REQUIRED OF OTHER CONTRACTS

The decision below deepens the existing conflict among state and federal courts regarding whether states may hold private arbitration agreements to a higher standard of enforceability than is applied to other valid contracts without conflicting impermissibly with the FAA. Relying on this Court's holdings in *Southland* and *Doctor's Associates*, a number of courts have refused to enforce state laws that impose burdens on arbitration agreements that are not generally applicable to other contracts. *See OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir. 2001) (FAA preempts Louisiana state arbitration law conditioning enforceability of construction arbitration agreement on selection of Louisiana forum); *Brayman Constr. Corp. v. Home Ins. Co.*, 319 F.3d 622 (3d Cir. 2003)

(Pennsylvania statute limiting enforceability of arbitration agreements preempted by FAA); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 162 (2d Cir. 1998) (FAA preempts New Jersey state law that "impermissibly burden[s]" arbitration agreements); *Heaberlin Farms, Inc. v. IGF Ins. Co.*, 641 N.W.2d 816 (Iowa 2002) (Iowa state arbitration law that excludes adhesion contracts from coverage is preempted by the FAA). As one court pointed out:

> Because the fundamental purpose of the Federal Arbitration Act "was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs'," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219, 105 S. Ct. 1238, 1241, 84 L. Ed. 2d 158 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)), the courts have been vigilant to ensure that state law concepts specially directed at arbitration contracts are not permitted to "eviscerate" that purpose, even indirectly.

Security Indus. Ass'n. v. Connolly, 703 F. Supp. 146, 151 (D. Mass. 1988), *aff'd*, 883 F.2d 1114 (1st Cir. 1989). These courts consistently have recognized that "a state law or regulation cannot take root if it looms as an obstacle to the achievement of the full purposes and ends which Congress has itself set out to accomplish." *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 49 (1st Cir. 1999) (citation omitted).

By contrast, some other courts, expressing a general disdain for mandatory arbitration, have permitted more onerous legal burdens to be imposed on arbitration agreements than exist for other types of contracts. *See Cruz v. Pacificare Health Sys., Inc.*, 66 P.3d 1157 (Cal. 2003) (claims for injunctive relief under state law are not arbitrable); *Broughton v. Cigna Healthplans*, 988 P.2d 67

(Cal. 1999) (same); *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924 (Ala. 1997) (waiver of right to trial by jury unenforceable unless there exists "clear and unmistakable" evidence of agreement to waive such rights), *overruled on other grounds by Ex parte Perry*, 744 So. 2d 859 (Ala. 1999).

In *Cruz v. Pacificare*, for instance, the California Supreme Court refused to enforce a valid agreement to arbitrate with respect to the plaintiff's action for injunctive relief under the state's Consumer Legal Remedies Act (CLRA). Citing with approval its prior ruling in *Broughton v. Cigna Healthplans*, 988 P.2d 67 (Cal. 1999), the court first acknowledged this Court's pronouncements regarding the enforceability of arbitration agreements:

> In *Broughton*, we recognized that the United States Supreme Court has emphasized Congress's and its own policy in favor of arbitration and, at least since 1984, has rejected numerous efforts and arguments by state courts, federal courts and litigants to declare certain classes of cases not subject to arbitration. Indeed, we acknowledged the Supreme Court's broad statement in its seminal arbitration case, *Southland Corp. v. Keating* that "'[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'"

Cruz v. Pacificare Health Sys., Inc., 66 P.3d at 1161-62 (citations omitted). The court disregarded this clear language, however, and instead relied on its own incorrect, albeit creative, interpretation:

> [A]lthough the court [sic] has stated generally that the capacity to withdraw statutory rights from the scope of arbitration agreements is the prerogative solely of Congress, not state courts or legislatures, it has never directly decided whether a legislature may restrict a private arbitration agreement when it inherently

> conflicts with a public statutory purpose that transcends private interests.

66 P.3d at 1163 (citation omitted). The court thus concluded, "it would be perverse to extend the policy so far as to preclude states from passing legislation the purposes of which make it incompatible with arbitration, or to compel states to permit the vitiation through arbitration of the substantive rights afforded by such legislation." *Id.*

Similarly, the Ninth Circuit in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), recently ruled that mandatory agreements to arbitrate are *presumptively* invalid under California law, rendering it virtually impossible to enforce such agreements in that state.[4] Grossly distorting the rule of unconscionability articulated by the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), the Ninth Circuit in *Ingle* declared, "we find the coverage of such arbitration agreements typically and grossly one-sided, and therefore, presumptively substantively unconscionable." 328 F.3d at 1174 n.10. It also reiterated the conclusion it drew last year in *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir.), *cert. denied*, 535 U.S. 1112 (2002), that any arbitration agreement required as a condition of employment, in essence, is *presumptively* procedurally unconscionable. *Id.* at 1171-72.

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[4] Notably, the Ninth Circuit's decision in *Ingle* was issued just days before the California General Assembly once again approved anti-arbitration legislation that would prohibit pre-dispute mandatory arbitration agreements requiring, as a condition of employment, waiver of an employee's or applicant's right to pursue claims under the state Fair Employment and Housing Act. *See* A.B. 1715, 2003-2004 Leg., Reg. Sess. (Cal. 2003) (*An Act to amend Section 1281 of the Code of Civil Procedure, and to add Section 12952 to the Government Code, relating to employment arbitration).*

This dim and altogether inaccurate view of the law unfortunately is not limited to the California courts. In *Allstar Homes*, for instance, the Alabama Supreme Court observed in a footnote:

> Although we do not address the full implications of waiving one's right to a trial by jury in favor of arbitration of disputes, we do point out that the due process safeguards found in judicial proceedings are largely absent in arbitration. The reputed informality and the relative speediness of an arbitration procedure are achieved by severely limiting discovery; imposing few evidentiary rules; giving the arbitrator almost unbridled discretion to make decisions without basing them on established principles of law or making written findings to support the arbitrator's conclusions; and providing virtually no right of appeal in the case of error in the arbitrator's decision.

711 So. 2d at 928 n1.

This Court repeatedly has affirmed the strong federal policy favoring arbitration, noting that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24 (1994)(citations omitted); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). Thus, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Despite this strong federal policy favoring arbitration, far too many courts continue to ignore the limitations placed on their authority to regulate agreements to arbitrate and seek to invalidate such agreements at every turn. Thus, certiorari

should be granted so that this Court may put to rest any lingering doubt as to the validity of arbitration in general, as well as the rights of states to regulate arbitration agreements beyond the permissible scope of the FAA.

III. RULES THAT IMPOSE GREATER RESTRICTIONS ON AGREEMENTS TO ARBITRATE THAN EXIST FOR OTHER CONTRACTS SUBSTANTIALLY UNDERMINE EMPLOYERS' EFFORTS TO DEVELOP AND ENFORCE UNIFORM ADR PROCEDURES

The lack of consistency in the courts regarding whether, and under what circumstances, private agreements to arbitrate will be enforced creates substantial uncertainty in an area of law that is of great importance to the business community. EEAC member companies, many of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. A number of EEAC member companies thus have adopted company-wide policies requiring the use of arbitration to resolve all employment-related disputes.

As this Court observed in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-123 (2001), there are "real benefits to the enforcement of arbitration provisions." In particular, "'[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . .'" *Id.* at 123. Thus, to exempt employment contracts from coverage under the FAA "would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in

the process undermining the FAA's proarbitration purposes and breeding litigation from a statute that seeks to avoid it." *Id.* (internal quotation and citation omitted).

There remain a number of notoriously anti-arbitration courts, notably in New Jersey and California, that continue to subject agreements to arbitrate to higher enforceability standards than are imposed upon other types of contracts. Multistate employers thus are faced with the real possibility that their programs will not be enforced uniformly for all of their employees. Indeed, employers are all but assured that their arbitration agreements, while valid in most other states, will be deemed unenforceable in New Jersey and California. As a consequence, employees subject to agreements to arbitrate who are located in New Jersey and California will not be required to submit their work-related disputes to arbitration, while their colleagues employed elsewhere will be so bound.

The prospect of having to litigate, from state to state, the enforceability of their arbitration agreements creates a chilling effect on employers' efforts to establish binding arbitration programs, and significantly undercuts the strong federal policy, as repeatedly endorsed by this Court, favoring private arbitration of employment disputes. For these reasons, this Court should review and reverse the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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